A

ITEM INDUSTRIAL ENGINEERING SDN BHD & ORS v. BANK UTAMA (MALAYSIA) BHD

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
SULONG MATJERAIE JCA
B MOHTARUDIN BAKI JCA
[CIVIL APPEAL NO: W-02-1699-2009]
27 NOVEMBER 2014

C ***BANKING:*** *Banks and banking business – Default in repayment of loan – Claim for recovery of loan from guarantors – Allegation that borrower breached terms and conditions of letter of offer for loan facilities – Compliance with conditions precedent before monies could be released to borrower – Whether borrower complied with conditions precedent – Whether monies released to borrower and utilised – Whether bank proved that borrower complied with conditions precedent in letter of offer to* D *avail them of facilities*

BANKING: *Banks and banking business – Guarantor – Default of repayment of loan by borrower – Claim for recovery of loan from guarantors – Whether bank made proper demand from guarantors before initiating action – Whether mere filing of writ and service constituted sufficient demand*

E

CIVIL PROCEDURE: *Trial – Submission of no case to answer – Allegation that borrower defaulted in repayment of loan – Claim for recovery of loan from guarantors – Contention that monies not released to borrower as conditions precedent not fulfilled – Whether submission of no case to answer fatal to defence's case – Evidence* F *Act 1950, s. 101*

The present appeal arose from the High Court's decision in allowing the respondent's ('the plaintiff') claim against the appellants ('the defendants') in respect of a default of banking facilities ('the facilities') totalling to RM2,042,204.21. The plaintiff, who provided the facilities to the first G defendant, claimed that the latter had breached the terms and conditions of the letter of offer for the facilities and defaulted on the repayment of the facilities, making the second and third defendants, as guarantors, liable for the repayment. In the High Court, the defendants elected to make a submission of no case to answer. The High Court Judge found that the defendants' objection was related to technical matter and was inconsistent H with the defence and proceeded to allow the plaintiff's claim on the grounds that (i) submission of no case to answer in banking matters are fatal; (ii) the plaintiff had established its allegations and there was no reason to disbelieve the plaintiff's witnesses; (iii) the plaintiff's allegation remain unrebutted in the absence of defendants' evidence and this attracted adverse presumption. I Hence, the present appeal. The defendants submitted that (i) the conditions precedent of the letter of offer makes it mandatory to comply with the said

conditions precedent before the facilities could be released to the defendants but the plaintiff failed to prove that the first defendant had complied with the conditions precedent in the letter of offer to avail them of the facilities and therefore, the facilities were never utilised if it were granted; and (ii) the requirement of making a demand against the second and third defendants as guarantors is a *sine qua non* before an action could be commenced. The plaintiff argued that a demand was made *via* a notice sent to the defendants respectively and alternatively, the plaintiff's writ and statement of claim by itself was a notice to the defendants.

Held (allowing appeal and setting aside order of the High Court)
Per Mohtarudin Baki JCA (for the majority):

(1) There was no evidence that the defendants had complied with the conditions precedent contained in the letter of offer. Since the banking facilities were never utilised by the defendants for non-compliance of the said condition precedent, the said facilities were never released to the defendants. The burden was on the plaintiff to prove that the facilities were granted without the conditions precedent being fulfilled. However, the plaintiff had failed to do so and had not discharged the burden of proof imposed on them under s. 101 of the Evidence Act 1950. (paras 61 & 64)

(2) In an action for recovery, a proper demand must be made to the guarantors before an action could be initiated against them. The plaintiff did not satisfy the pre-condition of making a demand to the second and third defendants and had also failed to show that such demand was sent to the defendants as there was no proof of posting. It was wrong to hold that no demand was required to create a cause of action and that the mere filing of the writ and the service was a sufficient demand obliging the defendants to pay. (paras 67, 69 & 72)

Per Zaleha Zahari FCJ (concurring):

(1) The duty of an advocate and solicitor is to assist the court by presenting documentary evidence in the most convenient manner. The manner in which the plaintiff proceeded to prove their case was extremely unsatisfactory. Counsel for the plaintiff clearly had not been diligent in preparing the plaintiff's case as he had adopted a lackadaisical attitude. The objection taken by the defendants should have been sustained. (para 43)

(2) The High Court Judge had arrived at a decision on evidence the veracity of which remained suspended. They should not have been taken into consideration. Shorn of these evidence, there was no evidence that the defendants had complied with the conditions precedents imposed by the plaintiff, the consequence of the facility either not utilised or the same was withdrawn by the plaintiff. (para 50)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Rayuan ini berbangkit daripada keputusan Mahkamah Tinggi dalam membenarkan tuntutan responden ('plaintif') terhadap perayu-perayu ('defendan-defendan') bagi kemungkiran membayar kemudahan perbankan ('kemudahan tersebut') yang berjumlah RM2,042,204.21. Plaintif, yang B memberikan kemudahan kepada defendan pertama, menghujahkan bahawa defendan pertama telah melanggar terma-terma dan syarat-syarat surat tawaran bagi kemudahan dan mungkir dalam pembayaran semula kemudahan tersebut, menyebabkan defendan-defendan kedua dan ketiga, sebagai penjamin, bertanggungan bagi pembayaran semula. Di Mahkamah C Tinggi, defendan-defendan memilih untuk mengemukakan hujahan tiada kes untuk dibalas. Hakim Mahkamah Tinggi mendapati bahawa bantahan defendan-defendan adalah berkenaan hal teknikal dan tidak selari dengan pembelaan dan seterusnya membenarkan tuntutan plaintif atas alasan bahawa (i) hujahan tiada kes untuk dibalas dalam hal-hal perkara perbankan adalah D menjejaskan; (ii) plaintif telah membuktikan dakwaan-dakwaannya dan tiada sebab untuk tidak mempercayai saksi-saksi plaintif; (iii) dakwaan-dakwaan plaintif kekal tidak disangkal dengan ketiadaan keterangan defendan-defendan dan ini membangkitkan anggapan bertentangan. Oleh itu, rayuan ini. Defendan-defendan menghujahkan bahawa (i) syarat-syarat awalan surat E tawaran menjadikan ia mandatori untuk mematuhi syarat-syarat awal sebelum kemudahan boleh dilepaskan kepada defendan-defendan tetapi plaintif gagal membuktikan bahawa defendan pertama telah mematuhi syarat-syarat awal dalam surat tawaran untuk membolehkan mereka mendapat kemudahan dan dengan itu, kemudahan tidak pernah digunakan sekiranya ia telah diberikan; dan (ii) keperluan untuk membuat tuntutan F terhadap defendan kedua dan ketiga sebagai penjamin-penjamin adalah intipati sebelum satu tindakan boleh dimulakan. Plaintif menghujahkan bahawa satu tuntutan telah dibuat melalui notis yang dihantar kepada defendan-defendan dan secara alternatifnya, writ dan penyataan tuntutan plaintif dengan sendiri merupakan notis kepada defendan-defendan.

G **Diputuskan (membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi)**
Oleh Mohtarudin Baki HMR (bagi majoriti):

(1) Tiada keterangan bahawa defendan-defendan telah mematuhi syarat- H syarat awalan yang terkandung dalam surat tawaran. Oleh kerana kemudahan perbankan tidak pernah digunakan oleh defendan-defendan atas sebab ketidakpatuhan syarat-syarat awal, kemudahan tersebut tidak pernah dilepaskan kepada defendan-defendan. Beban terletak pada plaintif untuk membuktikan bahawa kemudahan diberikan walaupun I syarat-syarat awalan tidak dipenuhi. Walau bagaimanapun, plaintif gagal berbuat sedemikian dan tidak melepaskan beban pembuktian yang diletakkan atasnya di bawah s. 101 Akta Keterangan 1950.

(2) Dalam satu tindakan pengambilan semula, satu tuntutan yang teratur mestilah dibuat terhadap penjamin-penjamin sebelum satu tindakan boleh dimulakan terhadap mereka. Plaintif tidak memenuhi pra-syarat membuat tuntutan terhadap defendan kedua dan ketiga dan juga gagal untuk membuktikan bahawa tuntutan sedemikian telah diposkan kepada defendan-defendan kerana tidak bukti pengeposan. Adalah salah untuk memutuskan bahawa tuntutan tidak diperlukan untuk membentuk satu kausa tindakan bahawa pemfailan sekadar writ dan penyampaiannya adalah tuntutan yang mencukupi bagi mewajibkan defendan-defendan membayar.

Oleh Zaleha Zahari HMP (menyetujui):

(1) Tugas seorang peguambela dan peguamcara adalah untuk membantu mahkamah dengan mengemukakan keterangan dokumentar dalam cara yang paling mudah. Cara di mana plaintif meneruskan untuk membuktikan kesnya sangat tidak memuaskan hati. Peguam plaintif jelas tidak teliti dalam menyediakan kes plaintif kerana bersikap sambil lewa. Bantahan yang dibuat oleh defendan-defendan sewajarnya dibenarkan.

(2) Hakim Mahkamah Tinggi mencapai keputusan berdasarkan keterangan yang kesahihannya kekal tergantung. Kesemuanya tidak sepatutnya dipertimbangkan. Tanpa keterangan ini, tiada keterangan bahawa defendan-defendan telah mematuhi syarat-syarat awalan yang dikenakan oleh plaintif, akibat daripada kemudahan yang sama ada tidak digunakan atau telah dikeluarkan oleh plaintif.

Case(s) referred to:

MBf Finance Bhd v. Hasmat Properties Sdn Bhd & Ors [1990] 1 CLJ 106; [1990] 2 CLJ (Rep) 461 HC

Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369

Tan Hock Chan v. Kho Teck Seng [1979] 1 LNS 110 FC

Tenaga Nasional Berhad v. Perwaja Steel Sdn Bhd [1995] 4 MLJ 673

Thor Eagle Maritime Agencies v. Innovest Berhad [2009] 1 LNS 490 HC

YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2) [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187 SC

Legislation referred to:

Evidence Act 1950, s. 101

Rules of the High Court 1980, O. 34

For the appellants - Jagjit Singh; M/s Jagjit Singh & Co

For the respondent - Paari Perumal (K Jayaratnam with him); M/s Jayaratnam & Partners

[Appeal from High Court, Kuala Lumpur; Suit No: D6-22-1225-2001]

Reported by Najib Tamby

A

JUDGMENT

Zaleha Zahari JCA:

[1] On 9 January 2012 the unanimous decision of this court was to allow the defendants' appeal and to set aside the decision of the High Court Judge
B dated 30 July 2009. I have read the judgment of my brother, Mohtarudin bin Baki JCA in draft as to why this appeal was allowed. My reasons in allowing this appeal was however different. They are as follows.

[2] In this judgment parties will be referred as they appeared in the Court below.

C

Background

[3] It is necessary to set out what transpired in this case in some detail.

[4] The plaintiff (respondent in this appeal) claimed that by letter of offer (ie, ID5) dated 21 July 1997 they had offered to the first defendant overdraft
D (OD), letters of credit (LC), trust receipts (TR), bank acceptances (BA) and bank guarantee (BG) facilities. The plaintiff alleged that the first defendant was in breach of the terms and conditions set out in the said facilities of which the second and third defendants were guarantors pursuant to letter of guarantee (exh. P1).

E

[5] In its statement of claim the plaintiff alleged that the defendants were indebted to the plaintiff as at 28 February 2001 in the following sums:

Overdraft Facility	RM 498,846.27
LC/TR/BA/BG	RM1,543,357.94

F

Total	RM2,042,204.21

[6] The defendants disputed the claim. The defendants' case was that the said facility was never granted as they were unable to comply with the conditions specified in the letter of offer. Further and in the alternative, even
G if the facility was granted the defendants claimed that they had never drawdown or utilised the facilities and put the plaintiff to strict proof of their claim.

[7] The record shows that at case management pursuant to by O. 34 of the Rules of the High Court 1980, as well as when trial commenced on 24 May
H 2005, the plaintiff's case rests on a single bundle of documents, ie, that listed in encl. (11).

[8] The first trial judge heard two of the plaintiff's witnesses, ie, Rashidah bt Abu Bakar (SP1) and Lim Siew Hua (SP2). PW1's evidence was formal, ie, to tender the letter of guarantee executed by the second and third
I defendants, (exh. P1).

[9] On 24 May 2005 SP2 testified, in the absence of the branch manager, she signed on behalf Norhafiz bin Malan the most senior officer in the credit department. The letter of offer was also signed by Norhafiz bin Malan on behalf of the bank.

[10] On the continued hearing of 6 February 2006 two other witnesses testified on behalf of the plaintiff, ie, Chey Onn Wah, (SP3) and Norhafiz bin Malan (SP4). The testimony of these two witnesses is reproduced for ease of reference.

(a) Chey Onn Wah

Chey Onn Wah (SP3), the branch manager in cross-examination, in response to questions posed whether the defendants had complied with the conditions precedent stipulated in the letter of offer (ID5) testified as follows:

Q: Rujuk kepada letter of offer m s 7 - conditions precedent: (a) Receipt of original copy of our letter of offer duly executed. Adakah encik mempunyai original copy?

A: Tidak ada.

Q: Condition kedua (b) Board resolution. Adakah Encik mempunyai Dokumen ini?

A: Tidak ada.

Q: Condition keempat (d)?

A: Tidak ada.

Q: Condition kelima (e)?

A: Tidak ada.

Q: Condition keenam (f)?

A: Tidak ada.

Q: Condition ketujuh (g)?

A: Tidak ada.

Q: Condition kelapan (h)?

A: Tidak ada.

Q: Condition kesembilan (i)?

A: Tidak ada.

On the occasions when SP3's evidence was in the affirmative the said answer was followed by him saying that he did have that particular document in question.

Q: Rujuk m/s 8 Bhg B. Adakah Bhg B (a) dipatuhi?

A: Saya tidak ada original copy.

A Q: Bagi bhg (b)?

A: Saya tidak ada board resolution.

Q: Rujuk m/s 11. Adakah item (d) dipatuhi?

A: Item (d) dipatuhi tapi saya tiada evidence.

B Q: Adakah bhg (e) dipatuhi?

A: Item (e) dipatuhi tapi saya tiada bukti.

Q: Adakah item (g) dipatuhi?

A: Saya tiada dokumen.

C Q: Adakah item (h) di patuhi?

A: Saya tiada dokumen bersama saya

. Q: Adakah Encik boleh mendapatkan dokumen?

A: Tiada dokumen.

D (b) Norhafiz bin Malan

Norhafiz bin Malan (SP4), the customer relationship officer, was the officer in charge of the defendants' account. In cross-examination when questioned whether the plaintiff would allow the defendants to do a E 'drawdown' if the defendants had failed to comply with the prescribed conditions precedent, his answer was as follows:

Q; Adakah Encik setuju ada kemungkinan oleh kerana Defendan gagal mematuhi syarat ini Bank tidak benarkan Defendan drawdown?

F A: Setuju.

Q: Adakah Encik setuju akibat tidak mematuhi syarat (tiada drawdown) ini tidak terdapat satu statement of account?

A: Setuju.

Q; Adakah Encik setuju dalam tindakan ini Bank tidak hantar surat?

G A : Jika tidak ada drawdown maka tiada surat akan dihantar.

Q: Dalam kes ini, adakah surat dihantar? Adakah apa-apa surat di dalam bundle?

A: Tiada surat yang dihantar di dalam bundle.

H Q: Jadi Encik setuju dalam tindakan ini memang tiada apa-apa drawdown bagi kemudahan?

A: Berdasarkan dokumen di Encl. ii tidak ada apa-apa drawdown dibuat.

I **[11]** What transpired on the next continued hearing date 5 July 2006 was this. There was a change of plaintiff's counsel. On this date the plaintiff was no longer represented by En Rosli but by two counsels, En Paari Perumal and En Jayaratnam. The plaintiff's new counsel applied for an adjournment

on the ground that they had just been retained. The defendants' counsel objected to the adjournment on the ground that his witness, who was from Sabah, was present in court on that date. The defendants' counsel also informed the court that the defendants was strongly objecting to the fresh documents listed in encl. (11) which the plaintiff was attempting to introduce which had just been filed and served on him.

[12] The court allowed the adjournment sought by the plaintiff's counsel. The case was adjourned to 6 July 2006 for continued hearing.

[13] The record shows that on the continued hearing date of 6 July 2006 the hearing again did not proceed on the same ground as the previous hearing date, ie, because the plaintiff had retained a new counsel to handle the plaintiff's case.

[14] There was then a lapse of almost eight months. On the continued hearing date of 5 March 2007 SP1 was recalled to mark the guarantee as exh. P1. The attempt to have the letter of offer to the first defendant (ID5) marked as an exhibit through SP1 was not allowed by the court as SP1 was not its maker.

[15] The record shows one year and nine months lapsed before the case was called again. The next continued hearing date was 9 August 2008. On this date the defendants' counsel informed the court that the plaintiff had, two days prior to that date (ie, on 7 August 2007) served upon him yet another bundle of documents ie, encl. (22) (second supplementary bundle). The defendants were objecting to them and that they also required time to seek client's instructions and, if need be, for the plaintiff's witnesses to be recalled.

[16] The court ruled that it was open to the defendants to raise their objections to the documents listed in the supplementary bundles which had recently been filed on the next hearing date. The case was then fixed the case for continued hearing for two days on 14 May 2008 and 15 May 2008.

[17] On 9 May 2008 the plaintiff's counsel filed two further supplementary bundle of documents ie, that listed in encls. (22) and (23).

[18] The record shows that on 14 May 2008, the case again did not proceed for continued hearing by reason of the two further supplementary bundle of documents filed on 9 May 2008 which had just been served on the defendants' counsel. In this situation it was not surprising for the defendants' counsel to request for time to obtain his client's instructions in respect the documents listed in the two further supplementary bundle of documents served on them. The case was then fixed for mention on 19 September 2008.

[19] The case was called before a different High Court Judge (second trial judge) on 18 September 2008. What transpired on 18 September 2008 before the second trial judge was significant and is reproduced in full:

A En. Paari Perumal bersama K Jayaratnam bagi pihak plaintiff

En. Harjinder Singh bagi pihak defendan-defendan

Semua ikatan dokumen telah difailkan

Terdapat 2 isu:

B 1. To recall SP1 to tender document.

2. Terdapat dokumen baru selepas case management yang mana defendan membantah kerana adalah akan stand pending defence

Mahkamah: 13-16.06 09 (SB)

C 19.03.09 (Submission)

Skeletal submission on the documents

[20] On the hearing date of 19 March 2009 for the hearing of submissions on the plaintiff's two supplementary bundle of documents which was objected to by the defendants' counsel, another High Court Judge (second D trial judge) presided over the case. The minutes recorded by the second trial judge on this date was as follows:

En Paari bagi pihak plaintiff.

En Paari: We were here this morning. No one told us case in the E afternoon. We would like to have the objection heard on 13.07.09. The other days will be kept depending on the outcome of the objection. The bundles of documents are the ones that we got late.

Mah. 13.07.09 (Objection on the 2 bundles of documents)

14-16.07 09 (SB)

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[21] On 16 July 2009 the case was called up for continued hearing before yet another High Court Judge (third trial judge) whose decision was the subject matter of this appeal before us. The minutes recorded before the third trial judge on 16 July 2009 was this:

G Mr. Paari and Mr. K Jayaratnam for the plaintiff

Mr Harjinder Singh for the Defendant.

Part heard matter

Pleadings - Enclosure 5

H Ikatan Bundle yang tidak dipersetujui - Encl 11,19,22, 24

Plaintiff is not relying on enc 23

Part heard- 4 witnesses have given evidence recalling PW4 to mark ID5 in encl 11.

I SD/s says encl 19, 22, 23, and 24 were all filed after 4 witnesses were called and gave evidence and cross-examination was completed. In consequence the Defendants says that it must be expunged from court records or/in the alternative if the plaintiff wants to proceed on these documents then it must be settled by submissions.

P/s: The documents were tendered late because there mergers with the new bank. Documents were given only later and we have produced in court. They are not going to be prejudice Court can still admit as exhibit but give low probation value (*sic*)

[22] The plaintiff's counsel then called five other witnesses ie, Azman bin Bahrin (PW5), Lee Huan Nee (PW6), Johari Ariff bin Osman (PW7), Yeap Eng Lock (PW8) and Jayaratnam a/l Kumarasamy (PW9) who was examined, subjected to cross-examination and re-examination by the defendants counsel. In the examination of these additional witnesses reference was made to the documents listed in supplementary bundle of documents in encls. (11), (19) and (22). The plaintiff then closed their case.

[23] The defendants counsel then elected to submit that that there was no case for the defendants to answer.

[24] The judge ruled in favour of the plaintiff. Hence this appeal.

The High Court Decision

[25] The learned trial judge entered judgment in favour of the plaintiff. His reasons are set out in one solitary paragraph ie, para. 5 of the judgment which states as follows:

5. I have read the evidence, read the documents, exhibits and submission of the parties in detail. The parties have dealt with the issues in detail. It will serve no useful purpose in repeating the same. I take the view that the plaintiff's claim must be allowed. My reasons *inter alia* are as follows;

(a) The plaintiff have established what was alleged in the statement of claim by oral; evidence as well as supporting documents sufficient for the defendants to be present in court and rebut the plaintiff's evidence in law.

(b) As the Defendants' contrary to what was alleged in the defence did not given (*sic*) any evidence what was stated by the plaintiff's stand unrebutted. (see *Aik Ming (M) Sdn Bhd & 8 Ors v. Chan Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639; and *Recalvia Design Steel (M) Sdn Bhd v. Vista Access Sdn Bhd & Anor* [2008] MLJ 2008 1 LNS 88). And it also in my view attracts the jurisprudence relating to adverse presumption.

(c) I have no reason to disbelieve the plaintiff's witness. It is my finding that the plaintiff has established its case.

(d) Submission of no case to answer in banking matters may be fatal when there are oral and supporting evidence to show nexus to the claim. The defendants have been cautioned of the consequence of no case to answer and I have set out the jurisprudence and the relevant cases relating to no case to answer in *Thor Eagle Maritime Agencies v. Innovest Berhad* [2009] 1 LNS 490. I do not wish to repeat the same.

[26] It is against this decision that the defendants now appeals.

A **The Appellants' Counsel's Submissions**

[27] The appellants' counsel submitted that the plaintiff had not discharged the burden of proof which lies upon them. The learned High Court Judge took a simplistic view. The learned judge failed to consider fundamental issues and facts when he ruled in favour of the plaintiff.

B

[28] The plaintiff had called four of their witnesses and the defendants had completed cross-examination of these witnesses. The defendants had tailored their cross-examination on the documents held out in the only bundle then before the court, ie, encl. (11).

C **[29]** The filing by the plaintiff of four supplementary bundle of documents mid-way through trial after four of the plaintiff's witnesses had completed giving their evidence and subjected to cross-examination based on encl. (11) had been strongly objected to by the defendants' counsel. Likewise, the supplementary bundle (encl. (19)) filed on 7 August 2007 (ie, two days before
D the continued hearing of 9 August 2007 and 10 August 2007) had also been objected by the defendants' counsel. On 9 May 2008 (ie, five days before the continued hearing of 14 May 2008 and 15 May 2008) the plaintiff filed two further supplementary bundle of documents ie, that listed in encls. (22) and (23).

E **[30]** On 9 July 2009 (ie, four days before the continued hearing dates of 13 July 2009 to 16 July 2009) the plaintiff filed another supplementary bundle of documents (ie, encl. (24)).

[31] The appellants' counsel submitted that to allow the plaintiff to introduce voluminous documents in the form of encls. (19), (22), (23) and
F (24) and to introduce new witnesses at such a late stage of trial was prejudicial to the defendants as the plaintiff was attempting to paint a different picture when they recognised that their avernments was not supported by their evidence. To allow the plaintiff to adduce fresh evidence in the form of encls. (19), (22), (23) and (24) and to introduce new witnesses falls nothing short
G but of a "trial by ambush".

[32] The court should not allow the documents listed in the supplementary bundle of documents to be part of the record because the said documents were at all material times available to the plaintiff. This is evident from the testimony of Azman bin Baharin (SP5), Lee Huan Nee (SP6), Johari Ariff bin
H Osman (SP7) and Yeap Eng Lock (SP8). All of the documents in encls. (15), (22), (23) and (24) were available way back in 2005, when the case came up for case management. The plaintiff's lackadaisical attitude prevented them from obtaining the documents at the earliest possible stage. Johari Ariff bin Osman (SP7) in cross-examination had testified that the request for the
I documents was only received by him from Yeap Eng Lock (SP8) in the month of July 2007. The plaintiff was clearly was not diligent.

[33] The letter of offer, though accepted, does not automatically confer upon the defendants the right to be entitled to the said facilities. The enjoyment of said facilities were only available for the defendants' benefit if the defendants strictly comply with all of the conditions precedent. The uncontroverted and unchallenged evidence of SP3 and SP4 elicited during cross-examination was that the defendants had not complied with these conditions precedent. Further, even if the facilities were granted, the same was never utilised by the defendants as there is no evidence, documentary or otherwise, of any proof of drawdown.

[34] In an action for recovery, a demand must be made to the guarantors before an action can be initiated against the guarantors, (the second and third defendants). The requirement of making a demand against the guarantors is a *sine qua non* before an action can be commenced against the guarantors.

[35] The defendants urged this court to allow the appeal with costs.

The Respondent's Counsel's Submission

[36] By reason of the defendants electing to make a submission of no case to answer, all of the evidence led by the appellants are assumed to be true. The case of *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369 was relied as authority for this proposition.

[37] On the documents not having been marked as exhibits and not admitted as evidence at trial, the respondent's counsel submitted that by reason of the documents having been produced through the relevant witnesses at trial and not ruled as inadmissible, it was in order for the trial judge to rely on them.

[38] Notice of demand to the defendants had been admitted in para. 11 of the defence. A notice dated 12 March 2001 had been sent to the defendants. PW9, an advocate and solicitor, had testified that notices of demand were issued to the defendants on behalf of the plaintiff. The plaintiff's writ and statement of claim itself was a notice to the appellants.

[39] The fact of disbursement of funds through overdraft and trust receipts were established through witnesses PW5, PW6, PW7 and PW8. On the conditions precedent not having been proved, and whether there was disbursements of funds for the appellants' utilisation, the court's attention was also drawn to the letter of offer (ID5) sub-cl. (j) which states "The bank reserves the right to add to, delete, alter, amend and vary any terms and conditions in its absolute discretion at any time it deems fit." The conditions precedent were for the benefit of the plaintiff and the plaintiff was entitled to waive them, if it so wished, before the disbursements of the funds.

[40] The court was urged to dismiss the appeal with costs.

A **Decision**

[41] I have considered the submissions in this appeal with some concern as they appear to show an inadequate grasp of matters which may be somewhat elementary.

B **[42]** The introduction of O. 34 to the Rules of the High Court 1980 ("the Rules"), the Rules then in force, marks a change from the traditional position under which the progress of a case was largely left in the hands of the parties. Pursuant to O. 34, the court, not the parties, now dictate the progress of cases at the pre-trial stage to ensure that the practices and C procedures applicable during the respective stages prescribed by the Rules are complied with.

[43] The duty of an advocate and solicitor is to assist the court by presenting documentary evidence in the most convenient manner. In preparing for trial it was incumbent upon parties to prepare agreed and non-D agreed bundles of documents. Bundles are made for the convenience of court and parties to facilitate a speedy trial. Documents crucial to the plaintiff's claim should be held out. If agreed, to set them out in a proper bundle and paged in order of date. If not agreed, then copies should be made available, bound and paged in another bundle.

E **[44]** Whilst I agree that strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, one however must also bear in mind that these forms and rules should not be disregarded for no reason whatsoever since they embody the experience of the courts over the years in the course of speedy and efficient administration of justice. Non-compliance F precluded a party in breach from tendering the documents except by leave of court.

[45] The manner in which the plaintiff's counsel had proceeded to prove their case was certainly in my view extremely unsatisfactory. The filing of not one, but four supplementary bundle of documents long after the period G to do so had expired, after four of the plaintiff's witnesses had given their evidence, had rightly been objected to by the defendants' counsel. The introduction of additional supplementary bundles of documents, encls. (11), (19), (22) and (24), on a piecemeal and instalment was certainly grossly unfair to the defendants as the defendants had not been given an opportunity H to inspect them. The documents listed in supplementary bundle of documents in encls. (11), (19), (22) and (24) clearly were disputed documents.

[46] Much time was expended before us in argument on the actual evidence upon which the High Court judgment his decision rests.

I **[47]** By reason of objection having been taken by the defendants' counsel, the court was in my view obliged to consider the objection raised and to rule thereon. From the record it would appear that the trial judge did not return

to the issue of whether to admit/not admit the documents listed in encls. (11), (19), (22), and (24). The general rule is that documents not admitted in evidence cannot be relied upon by the trial judge.

[48] There clearly has been an inordinate and inexplicable delay as to why the documents in the supplementary bundle of documents were not introduced earlier. The documents were always in the possession of the plaintiff but did not find it fit to file the same. The plaintiff's witnesses Azman bin Baharin (PW5), Lee Huan Nee (PW6), Johari Ariff bin Osman (PW7) and Yeap Eng Lock (PW8) testified before the court that all these documents in encls. (19), (22), (23) and (24) were available way back in 2005, the year when the case management was held.

[49] Counsel for the plaintiff clearly has not been diligent in preparing the plaintiff's case. Diligence means earnest and meticulous pursuit towards the attainment of one's goal. The plaintiff's counsel has, in my considered opinion, adopted a lackadaisical attitude in the preparation of his case and guilty of indolence. The question of denying the plaintiff the right to produce those documents does not arise. The plaintiff has only itself to blame for the predicament it had found itself in. Justice was not only to the plaintiff but also to the defendants. I am of the view that the objection taken by the defendants' counsel should have been sustained. Not having obtained leave of the court, the plaintiff should not have been allowed to introduce additional witnesses as a matter of course, and for such witnesses to refer to the documents listed in the supplementary bundles filed at mid-way through trial also as a matter of course.

[50] I am compelled to conclude that the learned judge had arrived at his decision on evidence the veracity of which remains suspended. The evidence led by additional witnesses by reference to the documents listed in the supplementary bundle of documents must be expunged from the court record. They should not have been taken into consideration. Shorn of these evidence there was no evidence that the defendants had complied with the conditions precedents imposed by the plaintiff, the consequence of the facility either not utilised or the same was withdrawn by the plaintiff.

[51] There are two sets of circumstances under which a defendant may submit that he has no case to answer. There may be such a submission, firstly in a situation where, accepting the plaintiff's evidence at its face value, no case has been established in law; and in the other, the evidence led by the plaintiff was so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

[52] I am of the view the evidence led by the plaintiff in this case was unsatisfactory. The trial judge should have made a finding that the burden of proof has not been discharged by the plaintiff and that there was no case for the defendants to answer. The learned trial judge accordingly erred in entering judgment for the plaintiff.

[53] For these reasons the appeal was allowed with costs and the decision of the High Court Judge set aside.

Mohtarudin Baki JCA:

[54] This is the appellants' appeal against the decision of High Court dated 30 July 2009 allowing the respondent's claim against the appellants in respect of a default of banking facilities totalling RM2,042,204.21.

For ease of reference, we shall refer the appellants as the defendants and the respondent as the plaintiff.

Brief Facts

[55] By letter of offer dated 21 July 1997, the plaintiff provided banking facilities to the first defendant while the second and third defendants were guarantors for the first defendant. The plaintiff claimed that the first defendant had breached the terms and conditions of the letter of offer and therefore defaulted on the said Banking Facilities. Thus, the second and third defendants liable to repay the plaintiff based on the letter of guarantee dated 31 December 1997. The plaintiff claimed that the first respondent had taken the overdraft facility (RM 498,846,27) and letters of credit, trust receipt, bankers acceptance and bank guarantee (RM1,543,357-94) totalling RM2,042,204-21 as at 28 February 2001.

The High Court

[56] At the proceedings before High Court, nine witnesses gave evidence for the plaintiff. The defendants closed the case without calling any witness and submitted a submission of no case to answer. Learned trial judge found that the defendants' objection during the trial was related to technical matter and was inconsistent with the defence. Upon perusal of the defence, it clearly shows that failure to call evidence was fatal to the defendants' case and therefore the plaintiff had proved their case against the defendants. The learned trial judge was of the view that the plaintiff's claim should be allowed for the following reasons:

(a) The plaintiff has established what was alleged in the statement of claim by oral evidence as well as supporting documents sufficient for the defendants to be present in court and rebut the plaintiff's evidence in law;

(b) As the defendants contrary what was alleged in the defence did not give any evidence, what was stated by the plaintiff stands unrebutted. It attracts the jurisprudence relating to adverse presumption;

(c) The learned trial judge has no reason to disbelieve the plaintiff's witnesses. The plaintiff has established its case; and

(d) Submission of no case to answer in banking matters may be fatal when there are oral evidence and supporting evidence to show nexus to the claim. The defendants have been cautioned of the consequence of no

case to answer and the learned trial judge had set out the jurisprudence and the relevant cases relating to no case to answer in *Thor Eagle Maritime Agencies v. Innovest Berhad* [2009] 1 LNS 490.

[57] The learned trial judge then found the defendants did not defend the plaintiff's action. Therefore, the plaintiff's claim is allowed with interest and costs fixed at RM10,000.

Appeal Before This Court

[58] On appeal, it was submitted that the defendants failed to comply with the conditions precedent of the letter of offer as the banking facilities would only be released after the defendants comply with the conditions precedents stipulated at pp. 7, 8 and 11 of the banking facilities. The wording of the said conditions precedent clearly states "shall be released" which makes it a mandatory requirement to comply with the said conditions precedent before the banking facilities can be released to the defendants. For convenience, we reproduce the said conditions precedent (at pp. 7, 8 and 11, part C of the appeal record) which provides as follows:

(i) The Back to Back LC facility shall be released upon completion of the following:

(a) Receipt of original copy of our Letter of Offer duly executed.

(b) Receipt of your company's Board Resolution authorizing the application and acceptance of the facilities together with the stipulated terms and conditions in this offer and authorizing specific person(s) to deal on your company's behalf.

(c) Receipt of Letter of Guarantee duly executed and signed from all the directors of Item Industrial Engineering Sdn. Bhd.

(d) Inward LCs are issued by reputable Banks acceptable to the Bank.

(e) Back to Back LC to be issued should expire not later than one week before the expiry of the master LC.

(f) The master LC should allow 3rd party documents.

(g) The terms and conditions for the back to back LC should ensure that the period allowed for presentation of documents under the master LC can be complied with.

(h) LCs are properly authenticated before acceptance as security.

(i) The terms and conditions for the back to back LC should be identical to the master LC except:-

- The beneficiary
- The applicant
- The amount
- The expiry date

A (ii) The banking Facilities shall be released upon completion of the following:

(a) Receipt of original copy of our Letter of Offer duly accepted;

(b) Receipt of Item Industrial Engineering Sdn Bhd board resolution authorizing the application and acceptance of the facilities.

B

(c) Letter of Guarantee duly executed and stamped.

(d) Receipt of FD of RM250,000-00.

(e) Receipt Letter of Set-Off duly signed and stamped.

C

(f) Receipt of guarantee cover from CGC.

(g) Irrevocable letter of instruction from Item Industrial Engineering Sdn Bhd to Tenaga Nasional Berhad to direct all payments to its account with us. TNB is to acknowledge on the letter.

D (h) ...

(i) Opening of the Current Account by your company with our Petaling Jaya Branch.

(j) ...

E **[59]** It was submitted on behalf of the defendants that during cross-examination, the branch manager of the appellant (PW3) failed to show that the defendants complied with the conditions precedent. His answers to all questions relating to the said documents stated in the conditions precedent were in negative. The relevant excerpt of PW3's testimony during cross-examination:

F

Q: Rujuk kepada letter of offer, ms. 7 - conditions precedent: (a) receipt of original copy of our letter of offer duly executed. Adakah Encik punyai original copy?

A: Tidak ada.

G Q: Condition kedua: (b) Board resolution. Adakah Encik punyai dokumen ini?

A: Tidak ada.

Q: Condition keempat: (d)?

H A: Tidak ada.

Q: Condition kelima: (e)?

A: Tidak ada.

Q: Condition keenam: (f)?

I A: Tidak ada.

Q: Condition ketujuh: (g)?

A: Tidak ada.

Q: Condition kelapan: (h)?

A: Tidak ada.

Q: Condition kesembilan: (i)?

A: Tidak ada.

Q: Rujuk Bhg. B. Adakah Bhg. B(a) dipatuhi?

A: Saya tidak ada original copy.

Q: Bagi Bhg.(b)?

A: Saya tidak ada Board resolution.

Q: Rujuk m.s. 11. Adakah item (d) dipatuhi?

A: Item (d) dipatuhi tetapi saya tiada evidence.

Q: Adakah Bhg.(e) dipatuhi?

A: Item (e) dipatuhi tapi saya tiada bukti.

Q: Adakah item (g) dipatuhi?

A: Saya tiada dokumen.

Q: Bagi item (h) adakah dipatuhi?

A: Saya tiada dokumen bersama saya.

Q: Adakah Encik boleh dapatkan dokumen?

A: Tiada dokumen.

[60] Similarly PW4, the customer relation officer (CRO) who was in charge of the first defendant account had also failed to show that the defendants complied with the conditions precedent stipulated in the letter of offer. All his answers for similar questions directed to PW3 during cross-examination were "tiada di dalam Bundle Dokumen".

[61] Therefore, based on the above testimonies, it is clear that there was no evidence that the defendants had complied with the strict conditions precedent contained in the letter of offer. It is further submitted by the defendants that the plaintiff failed to prove that the first defendant had complied with the conditions precedent in the letter of offer to avail them of the purported facilities offered by the plaintiff. The letter of offer though accepted does not automatically confer the right to the defendants to be entitled to the said facilities which only available for the defendants when the all the conditions stipulated in the said Facilities (including the conditions precedent) were fulfilled.

[62] In the alternative, the defendants submitted that if the said facilities were granted, it was never been utilised by the defendants as there is no documentary or other evidence of any proof of a drawdown.

[63] We are in agreement with the submission of the learned counsel for defendants on this issue. The plaintiff had failed to prove that the conditions precedent were adhered to by the defendants as it is contrary with the evidence of PW3 and PW4 who confirmed that the defendants had not complied with the conditions precedent resulting the facilities were not made available to the defendants. It is the duty of the plaintiff to prove that the facilities were released to the defendants on the balance of probabilities, failing which, will entitle the defendants to make a submission of no case to answer as provided under s. 101 of the Evidence Act 1950. Therefore, we find that the learned trial judge failed to appreciate the fact that the defendants failed to comply with the conditions precedent before the facilities "shall be released" to first defendant. The plaintiff had also failed to show any proof of drawdown of the said facilities.

[64] Next, the issue is whether the defendants utilise or drawdown the banking facilities? From the evidence gleaned above, PW3 had confirmed that although there was an offer for the banking facilities, they were not been utilized by the defendants. We find in the supplementary appeal record (at p. 34), PW3 had testified during cross-examination that: "From the documents that I have at the moment, I can't prove the facility was drawdown". Based on the evidence of PW4, he confirmed that the plaintiff would not allow the defendants to do a drawdown if the defendants failed to comply with the conditions precedents. Therefore, we are of the view that since the banking facilities were never utilised by the defendants for non-compliance of the said conditions precedents, the said facilities were never released to the defendants. For that being so, the burden is on the plaintiff to prove in evidence that the facilities were granted without the conditions precedent being fulfilled. However, the plaintiff had failed to do so. Therefore, the plaintiff had not discharge the burden of proof imposed on them under s. 101 of the Evidence Act 1950 which provides as follows:

> 101. Burden of Proof
>
> (1) Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said the burden of proof lies on that person.

[65] In the case of *Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673, cited by the defendants, the court held:

> Under Section 101(1) of the Evidence Act 1950, whoever desires the court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove such facts as the Plaintiff desires the Court to give judgment as to its right to claim against the Defendant or the Defendant's liability to pay the Plaintiff. The burden of proof is on the Plaintiff: Section 101(2). In order to succeed here, the Plaintiff must prove its claim affirmatively.

[66] Applying the principle as enunciated above, we are with the defendant's argument that the plaintiff had failed to prove that the first defendant had complied with the conditions precedent in the banking facilities to avail them on the facilities offered by the plaintiff. The facilities were never utilised as there is no evidence either documentary or otherwise of any proof of drawdown.

[67] In an action for recovery, a proper demand must be made to the guarantors ie, to the second and third defendants before an action can be initiated against them. In the present case, the plaintiff did not satisfy the precondition of making a demand to the guarantors. The defendants submitted that the requirement of making a demand against the guarantors is *sine qua non* before an action can be commenced against the guarantors. We refer to the letter of guarantee found at pp. 14 to 22 of the appeal record part C. It is clear that the said guarantee is an "on demand" guarantee. This can be seen from the words "we will pay you on demand".

[68] The plaintiff argued that a demand was made *vide* a notice dated 12 March 2001 (at p. 23 of the rekod rayuan bahagian A) and was sent to the defendants respectively. Additionally the plaintiff is also relying on the evidence of PW9, an advocate and solicitor who testified that notices of demand were issued to the defendants on behalf of the plaintiff which can be found at pp. 69-70 of the appeal record part B. Alternatively, the plaintiff submitted that in any event, the plaintiff's writ and statement of claim itself is a notice to the defendants by referring to the case of *Tan Hock Chan v. Kho Teck Seng* [1979] 1 LNS 110; [1980] 1 MLJ 308.

[69] With respect, we are unable to agree with this proposition. It is wrong to hold that no demand was required to create a cause of action and that the mere filing of the writ and the service thereof was a sufficient demand obliging the defendants to pay. In the instant case, the letter of guarantee is clear (at pp. 15 to 23 of the appeal record part C). The said letter of guarantee was prepared by PW1. In the said Guarantee, it is clearly stated in para. 1 the words "we will pay you on demand". Therefore, it is our considered view that a proper demand must be made and it is a condition precedent to establishing a claim against a guarantor.

[70] The Supreme Court in *YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2)* [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187 at p. 190; [1989] 3 MLJ 155 at p. 157 where Lee Hun Hoe CJ held:

> We are unable to agree with the views of the learned judge in this case that no antecedent demand was required to create a cause of action and the mere filing of the writ and service thereof was a sufficient demand obliging the third defendant to pay. Here the letter of guarantee is clear. A proper demand must be made. It is a condition precedent to establishing a claim against the guarantor.

[71] Similarly, in the case of *MBf Finance Bhd v. Hasmat Properties Sdn Bhd & Ors* [1990] 1 CLJ 106; [1990] 2 CLJ (Rep) 461; [1990] 1 MLJ 180 when the court held:

> However an appeal by the third defendant who had alleged that no demand had been made on him was allowed by the Supreme Court on 12th August 1988. Unfortunately there was no written judgment although the case has been reported in *YM Orang Kaya Menteri Paduka Dato Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd*. In the circumstances, I was inclined to hold that a formal demand is still necessary despite the principal debtor clause in the guarantee.

PW9 during cross-examination testified that:

> Q: See encl 11, page 23 to 25. These are purported letter of demand issued by your firm by way of registered post?
>
> A: Yes
>
> Q: Do you have the proof of posting?
>
> A: Not in the bundle.

[72] Thus, we are of the considered view that the learned trial judge had failed to consider that the plaintiff had failed to prove that a proper demand was made to the guarantors before the plaintiff can initiate this proceedings against them. Undeniably, there is a demand filed by the plaintiff in the appeal record. However, the plaintiff failed to show any evidence that such demand was sent to the defendants as there was no proof of posting. We find that the second and third defendants not served with the letter of demand in the absence of the relevant AR card in the bundle.

[73] In short, we find that the learned trial judge had failed to consider the fact that; first, plaintiff failed to prove that the conditions precedent was adhered to by the defendants before the facilities is released to the latter; second, the plaintiff also failed to show any evidence to prove the drawdown of the said facilities without any evidence relating to it; and third, the plaintiff had failed to prove that a proper demand was made to the guarantors. Hence, the plaintiff had failed to prove their case against the defendants on the balance of probabilities.

[74] Grounded by the above reasoning, we unanimously allow the defendants' appeal against the decision of the learned trial judge with costs fixed at RM10,000. Consequently, we ordered that the order of the High Court is set aside and deposit to be refunded to the appellants.